



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

STAFF SUBMITTAL

COMMISSION ON WATER RESOURCE MANAGEMENT

January 28, 2016
Honolulu, Hawaii

Find that Landowner, Kamehameha Schools, Allegedly Violated Section 174C-93, Hawaii Revised Statutes (HRS) by Installing a Stream Diversion Works Without a Permit;
Request the Issuance of Administrative and Civil Penalties of \$900 Per HRS §174C-15;
Approve a Stream Diversion Works Permit (SDWP.3936.2) Application After-The-Fact;
A Petition to Amend Instream Flow Standard is Not Required by the Landowner per HRS §174C-71;
Update Standard Stream Channel and Diversion Works Permit Conditions
Lumaha'i River, Hanalei, Kaua'i, TMK: (4) 5-7-003:001

LANDOWNER:

Kamehameha Schools
567 South King Street, Suite 200
Honolulu, HI 96813

APPLICANT:

Alfred Harada and Sierra-Lynn Boro-Harada
PO Box 1004
Hanalei, HI 96714

SUMMARY OF REQUEST

That the Commission on Water Resource Management (Commission):

1. Find that Kamehameha Schools (Landowner) violated Section 174C-93, Hawaii Revised Statutes (HRS), Section 13-169-50, Hawaii Administrative Rules (HAR), and §13-168-32, HAR by installing a stream diversion works without a permit;
2. Issue administrative and civil penalties of \$900 against the Landowner pursuant to HRS §174C-15, HAR §13-168-3, and Administrative and Civil Penalty Guideline (G14-01);
3. Issue a written warning to the Landowner indicating any future violations involving a stream diversion without the necessary permits may be considered repeat violations with fines up to \$1,000 for each day of violation;
4. Approve a Stream Diversion Works Permit (SDWP.3936.2) Application after-the-fact for a battery of eight intakes diverting about 0.54 mgd of water to irrigate five acres of taro and five acres of banana, ti, and luau leaf;

Approved by Commission on
Water Resource Management
at the meeting held on

1.28.16

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5. Find that the diverted amount requested, 0.54 mgd, being less than 1% of the average annual flow, is within the normal variability of streamflow and considered an insubstantial modification. Therefore, a Petition to Amend Instream Flow Standard is not required by the Landowner/Applicant under HRS §174C-71 and HAR §13-169-36; and
6. Update the standard stream channel alteration permit and diversion works permit conditions to state that the project may require other agency approvals regarding wetlands, water quality, grading, stockpiling, endangered species, and floodways.

LOCATION: West bank of the Lumaha'i River, Kaua'i (Site). (**Exhibit 1**).

STREAM DESCRIPTION

The Lumaha'i River (from the point of diversion) is a 9-mile long perennial river with numerous tributaries (**Exhibit 2**) and a drainage area of 13 square miles. It drains into the ocean east of Wainiha Bay. The USGS does not maintain an active gaging station on this river; however, from 1914 – 1933 (USGS Gage No. 16106000) the average annual flow was 75 mgd.

ALLEGED UNPERMITTED USES

A battery of eight intakes consisting of two, three, and four-inch flex hoses tethered to buoys and connected to a series of pumps were installed in the late 1990's without a Stream Diversion Works Permit (**Exhibits 3 and 4**).

BACKGROUND

In the late 1990s, the Applicants received a lease from the Landowner for taro cultivation and diversified agriculture on 10 acres on TMK (4) 5-7-003:001.

On November 26, 2013, the Department of Business, Economic Development and Tourism's (DBEDT) Office of Planning requested comments regarding Kamehameha Schools' Petition for Declaratory Order to Designate Important Agricultural Lands for 190 acres of land in Hanalei, Kaua'i.

On December 16, 2013, the Commission on Water Resource Management (Commission) commented to DBEDT that an agricultural operation existed on Lumaha'i River that may be relying on surface water and that the Commission had no record of a stream diversion works being registered or permitted. The Commission recommended that an after-the-fact SDWP application be filed prior to designation of the proposed Lumaha'i parcels as Important Agricultural Lands.

On March 10, 2014, the Applicant filed an incomplete SDWP application. The Applicant was subsequently notified via phone that more information was needed to complete the application.

On July 29, 2015, the Applicant filed a complete SDWP application.

AGENCY REVIEW COMMENTS:

County of Kauai, Dept. of Public Works: Not subject to our regulatory authority.

County of Kauai, Planning Dept.: No response.

Dept. of Hawaiian Home Lands: No response.

Dept. of Land and Natural Resources (DLNR), Aquatic Resources: The Lumaha‘i River is one of the most pristine rivers and is recognized as having the most pristine riverine estuary in the State. Native amphidromous gobies (‘o‘opu), ‘opae (shrimp) and edible snails (hīhīwai or wi) are exceptionally abundant in this north shore Kaua‘i river. The ‘o‘opu nākea and ‘o‘opu nōpili, both culturally, economically and ecologically important, spawn from the last riffle in the river and downstream throughout the estuary. The Division of Aquatic Resources is mandated to protect native fisheries and their habitats and has adopted a “no net-loss” policy.

DLNR, Engineering: The project site according to the Flood Insurance Rate Map is located in Zone A. The National Flood Insurance Program (NFIP) regulates developments within Zone A. The project must comply with the rules and regulations of NFIP under Title 44 of the Code of Federal Regulations whenever development within a Special Flood Hazard Area is undertaken.

DLNR, Forestry and Wildlife: No response.

DLNR, Historic Preservation: No response.

DLNR, Land Division: Not subject to our regulatory authority.

DLNR, State Parks: Not subject to our regulatory authority.

Dept. of Health (DOH), Clean Water Branch:

1. We do not condone the issuance of any after-the-fact approval or permit.
2. Any project and its potential impacts to State waters must meet the following criteria:
 - a. Antidegradation policy (HAR, §11-54-1.1) requires that the existing uses and the level of water quality necessary to protect the existing uses of the receiving State water be maintained and protected;
 - b. Designated uses (HAR, §11-54-3) as determined by the classification of the receiving State waters; and
 - c. Water quality criteria (HAR, §11-54-4 through §11-54-8).
3. There is insufficient information for the DOH to evaluate the project for the requirement for a National Pollutant Discharge Elimination System (NPDES) permit. In accordance with HAR §11-54-04 and §11-55-34.05, the Director of Health may require the submittal of an individual permit application or a Notice of Intent (NOI) for general permit coverage authorized under the NPDES. Your applicant may be required to obtain

NPDES permit coverage for discharges of wastewater, including storm water runoff, into State surface waters (HAR, Ch. 11-55).

- a. Nor NPDES general permit coverage, a Notice of Intent (NOI) form must be submitted at least 30 calendar days before the commencement of the discharge. An application for a NPDES individual permit must be submitted at least 180 calendar days before the commencement of the discharge. To request NPDES permit coverage, your applicant must submit the applicable form ("CWB Individual NPDES Form" or "CWB NOI Form") through the e-Permitting Portal and the hard copy certification statement with the respective filing fee (\$1,000 for an individual NPDES permit or \$500 for a Notice of General Permit Coverage). Please open the e-Permitting Portal website located at: <https://eha-cloud.doh.hawaii.gov/epermit/>. Your applicant will be asked to do a one-time registration to obtain a login and password. After registering, click on the Application finder tool and locate the appropriate form. Follow the instructions to complete and submit the form.
4. If the project involves work in, over, or under waters of the United States, it is recommended that the applicant contact the Army Corp of Engineers, Regulatory Branch regarding their permit requirements.
 - a. Pursuant to Federal Water Pollution Control Act ["Clean Water Act" (CWA)], Paragraph 401(a)(1), a Section 401 Water Quality Certification (WQC) is required for "[a]ny applicant for Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters. . . " The term "discharge" is defined in CWA, Subsections 502(16), 502(12), and 502(6); Title 40 of the Code of Federal Regulations, Sec. 122.2; and HAR, Ch. 11-54.
 5. Please note that all discharges related to the project construction or operation activities, whether or not NPDES permit coverage and/or Section 401 WQC are required, must comply with the State's Water Quality Standards. Noncompliance with water quality requirements contained in HAR, Ch. 11-54, and/or permitting requirements, specified in HAR, Ch. 11-55, may be subject to penalties of \$25,000 per day per violation.
 6. It is the State's position that all projects must reduce, reuse, and recycle to protect, restore, and sustain water quality and beneficial uses of State waters. Project planning should:
 - a. Treat storm water as a resource to be protected by integrating it into project planning and permitting.
 - b. Clearly articulate the State's position on water quality and the beneficial uses of State waters.
 - c. Consider storm water Best Management Practice approaches that minimize the use of potable water for irrigation through storm water storage and reuse, percolate storm water to recharge groundwater to revitalize natural hydrology, and treat storm water which is to be discharged.
 - d. Consider the use of green building practices, such as pervious pavement and landscaping with native vegetation, to improve water quality by reducing excessive runoff and the need for excessive fertilization, respectively.

- e. Identify opportunities for retrofitting or bio-engineering existing storm water infrastructure to restore ecological function while maintaining, or even enhancing, hydraulic capacity. Particular consideration should be given to areas prone to flooding, or where the infrastructure is aged and will need to be rehabilitated.

Staff: The lead agency for the protection of water quality is the Department of Health, Clean Water Branch, who administer the Federal Clean Water Act (33 U.S.C. §1251 et seq.) and the State Water Pollution Act (HRS Ch. 342D; HAR Ch. 11-54 Water Quality Standards; and HAR Ch. 11-55 Water Pollution Control). HAR §11-54-1 through §11-54-8 defines Best Management Practices, water quality criteria applicable to inland and nearshore waters and is based on the Federal Clean Water Act. HAR Ch. 11-55 Appendix C defines discharges of storm water associated with construction activity.

We recommend that the Landowner/Applicant contact the DOH to determine if other permits are required. We also recommend that the Landowner/Applicant contact the East Kauai Soil and Water Conservation District regarding additional conservation practices.

Office of Hawaiian Affairs: As provided, the SDWP application does not contain information necessary for our agency's review. Although the request for comments includes the Notice of Violation, we were not provided with any information as to the nature of the violation and whether the violation is cured in its entirety by the subject SDWP application. The SDWP application also states that the water will be used to irrigate lo'i, but that little water will be returned to the stream. We would ask that additional information be provided as to why water is not returned to the stream as part of lo'i kalo cultivation, as well as a response to C-14(h), which asks the applicant to describe flow characteristics during seasonally low flow conditions and the effect of the diversion on the stream. Finally, the SDWP does not discuss the irrigation of the additional five acres of traditional crops (banana, ti, and luau leaf), aside from a brief description on the first page of the SDWP application.

Although we generally encourage local agriculture production, especially the cultivation of kalo, OHA also seeks to protect public trust resources and to ensure their maximum reasonable and beneficial use. The information requested herein is meant to further such a consideration by OHA and by the Commission in its review of the SDWP application.

Staff: According to the Application, very little water is returned to the river and lo'i outlets are modified to hold water in for kalo. Farming practices are not regulated by the Commission. This is a private matter between the Landowner and the Applicant. The nature of the violation is a stream diversion works without a permit and the violation is cured by the subject SDWP application. Between 1914 – 1933 the average annual flow of the Lumaha'i River was 75 mgd. While there is no current gage data, the Application requests to divert 0.54 mgd or less than 1% of the average annual flow. We believe that this is an insubstantial amount and don't believe that streamflow will be adversely affected during low flow conditions.

US Army Corps of Engineers: This action may require work within the River, may be located within the tidally influenced portion, and may result the discharge of fill material. Therefore, in accordance with Section 10 (Rivers and Harbors Act of 1899) and Section 404 (Clean Water Act), a permit from this office may be necessary.

Staff: We recommend that the Landowner/Applicant contact the Army Corps of Engineers regarding their permit requirements, if any.

US Fish and Wildlife Service: Data compiled by the Hawaii Biodiversity and Mapping Program, indicate the following species are known to occur or transit through the vicinity of the project area: the endangered Hawaiian black-necked stilt (*Himantopus mexicanus knudseni*), Hawaiian moorhen (*Gallinula chloropus sandvicensis*), Hawaiian coot (*Fulica alai*), and Hawaiian duck (*Anas wyvilliana*) (hereafter collectively referred to as Hawaiian waterbirds); the endangered Hawaiian goose (*Branta sandvicensis*); and the threatened Newcomb's snail (*Erinna newcombi*). Designated critical habitat for the Newcomb's snail is located upstream from the project area in Lumaha'i Valley. We provide the following comments which include recommendations to avoid and minimize project impacts to listed species.

Hawaiian waterbirds and Hawaiian geese may be attracted to the applicant's taro fields and other irrigated agricultural crop fields. If attracted to sub-optimal habitat, these species may suffer adverse impacts, such as predation and reduced reproductive success, and thus the project may create an attractive nuisance. We recommend the applicant implement a program to control predators (e.g., feral cats and rats) on the property. We also recommend the applicant work with our office to develop specific measures to integrate into their agricultural practices to avoid potential impacts to listed species (e.g., buffers around birds and nests).

Under certain environmental conditions, *Clostridium botulinum*, a bacteria commonly occurring in nutrient-rich substrate, may produce toxins that when ingested by Hawaiian waterbirds or Hawaiian geese results in paralysis and most often mortality (referred to as avian botulism). Avian botulism has been documented annually in the taro fields at the Hanalei National Wildlife Refuge over the past five years. We recommend the applicant work with our office so that we may assist them in developing measures to avoid fostering conditions that promote avian botulism and a monitoring plan for early detection and response.

The Newcomb's snail is an aquatic snail known to occur at 10 small locations in freshwater streams and springs located in watersheds found in the mountainous interior of the island of Kaua'i. One of the largest populations of Newcomb's snails ever documented occurs in the flowing waters of Lumaha'i River, including 3.11 miles of stream channel within the elevation contours of 600 to 1,500 feet. The Newcomb's snail, like other Lymnaeid snail species, generally feed on algae and vegetation growing on submerged rocks. Some of the historical decline of the snail may be attributed to habitat loss and degradation through water diversion and well drilling. The Service does not anticipate impacts to the upstream population of Newcomb's snail due the proposed downstream diversion.

Based on the information included in the application as currently written, the proposed diversion and agricultural activities of the applicant will not avoid and minimize potential impacts to listed

Hawaiian waterbirds and Hawaiian geese. We recommend that all measures to avoid and minimize impacts to these listed species, described in this letter, are conditions of the after-the-fact stream diversion works permit.

Staff: We recommend that the Landowner/Applicant contact the Fish and Wildlife Service regarding their concerns regarding impacts to birds, monitoring plans, and permit requirements, if any.

HRS CHAPTER 343, ENVIRONMENTAL ASSESSMENT:

Office of Environmental Quality Control: This action did not trigger an environmental assessment pursuant to HRS §343-5(a).

LEGAL AUTHORITIES

Water as a Public Trust. Under the public trust and HRS §174C, there is an inherent presumption in favor of the four public trust purposes, yet allowing for use and development in a reasonable and beneficial manner. The state water resources trust thus embodies a dual mandate of protection and maximum reasonable and beneficial use. The four public trust purposes are:

1. Maintenance of waters in their natural state;
2. Domestic water use of the general public, particularly drinking water;
3. The exercise of Native Hawaiian and traditional and customary rights, including appurtenant rights; and
4. Reservations of water for use on Hawaiian home lands. *Water Use Permit Applications*, 94 Hawaii 97, 9 P.3d 409 (2000); and *Waiola O Molokai, Inc.*, 103 Hawaii 401, 83 P.3d (2004).

HRS §174C-15 Penalties and common law remedies. Provides for fines of up to \$5,000 for violation of any provision of HRS §174C. For a continuing offense, each day during which the offense is committed is a separate violation.

HRS §174C-71 Protection of instream uses. The commission shall establish and administer a statewide instream use protection program. In carrying out this part, the commission shall cooperate with the United States government or any of its agencies, other state agencies, and the county governments and any of their agencies. In the performance of its duties the commission shall:

- (1) Establish instream flow standards on a stream-by-stream basis whenever necessary to protect the public interest in waters of the State;
 - (A) The commission, on its own motion, may determine that the public interest in the waters of the State requires the establishment of an instream flow standard for streams;
 - (B) In acting upon the establishment of instream flow standards, the commission shall set forth in writing its conclusion that the public interest does or does not require, as is appropriate, an instream flow standard to be set for the stream, the reasons therefor, and the findings supporting the reasons;

- (C) Each instream flow standard shall describe the flows necessary to protect the public interest in the particular stream. Flows shall be expressed in terms of variable flows of water necessary to protect adequately fishery, wildlife, recreational, aesthetic, scenic, or other beneficial instream uses in the stream in light of existing and potential water developments including the economic impact of restriction of such use;
 - (D) Establishment or modification of an instream flow standard shall be initiated by the commission by providing notice of its intention to set an instream flow standard in a newspaper of general circulation published in the vicinity of the stream in question, to the mayor of the appropriate county, and to persons who have previously requested such notice in writing;
 - (E) After giving notice of its intention to set an instream flow standard, the commission or other agencies in participation with the commission shall investigate the stream. During the process of this investigation, the commission shall consult with and consider the recommendations of the department of health, the aquatic biologist of the department of land and natural resources, the natural area reserves system commission, the University of Hawaii cooperative fishery unit, the United States Fish and Wildlife Service, the mayor of the county in which the stream is located, and other agencies having interest in or information on the stream, and may consult with and consider the recommendations of persons having interest in or information on the stream. In formulating the proposed standard, the commission shall weigh the importance of the present or potential uses of water from the stream for noninstream purposes, including the economic impact of restriction of such uses. In order to avoid or minimize the impact on existing uses of preserving, enhancing, or restoring instream values, the commission shall consider physical solutions, including water exchanges, modifications of project operations, changes in points of diversion, changes in time and rate of diversion, uses of water from alternative sources, or any other solution;
 - (F) Before adoption of an instream flow standard or modification of an established instream flow standard, the commission shall give notice and hold a hearing on its proposed standard or modification;
- (2) Establish interim instream flow standards;
- (A) Any person with the proper standing may petition the commission to adopt an interim instream flow standard for streams in order to protect the public interest pending the establishment of a permanent instream flow standard;
 - (B) Any interim instream flow standard adopted under this section shall terminate upon the establishment of a permanent instream flow standard for the stream on which the interim standards were adopted;
 - (C) A petition to adopt an interim instream flow standard under this section shall set forth data and information concerning the need to protect and conserve beneficial instream uses of water and any other relevant and reasonable information required by the commission;

- (D) In considering a petition to adopt an interim instream flow standard, the commission shall weigh the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes, including the economic impact of restricting such uses;
- (E) The commission shall grant or reject a petition to adopt an interim instream flow standard under this section within one hundred eighty days of the date the petition is filed. The one hundred eighty days may be extended a maximum of one hundred eighty days at the request of the petitioner and subject to the approval of the commission;
- (F) Interim instream flow standards may be adopted on a stream-by-stream basis or may consist of a general instream flow standard applicable to all streams within a specified area;

HRS §174C-93 Permits for construction or alteration. No person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a permit from the commission.

HAR §13-168-2 Definitions.

“Stream diversion” means the act of diverting, pumping or otherwise removing water from a stream into a channel, ditch, pipeline, or other conduit.

“Stream diversion works” means any artificial structure, excavation, pipeline, or other conduit constructed singly or in combination, for the purpose of diverting or otherwise removing water from a stream into a channel, ditch, tunnel, pipeline, etc.

HAR §13-168-3 Penalties. (a) Any person who violates any provision of this chapter or any permit condition or who fails to comply with any order of the commission may be subject to a fine imposed by the commission. Such fine shall not exceed \$1,000 per violation. For a continuing offense, each day's continuance is a separate violation.

HAR §13-168-32 Stream diversion permits. (a) No person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a stream diversion permit from the commission...

(d) In reviewing an application for a permit, the commission shall cooperate with persons having direct interest in the stream diversion works and be guided by the following general considerations:

- (1) The quantity and quality of the stream water or the stream ecology shall not be adversely affected.
- (2) Where instream flow standards or interim instream flow standards have been established pursuant to chapter 13-169, no permit should be granted for any diversion works which diminishes the quantity or quality of stream water below the minimum established to support identified instream uses, as expressed in the standards.
- (3) The proposed diversion works shall not interfere substantially and materially with existing instream or noninstream uses or with diversion works previously permitted.

HAR §13-169-2 Definitions. As used in this chapter, unless the context otherwise requires:

“Instream flow standard” or “permanent instream flow standard” means a quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect aquatic life, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses.

“Interim instream flow standard” means a temporary instream flow standard of immediate applicability, adopted by the commission without the necessity of a public hearing, and terminating upon the establishment of an instream flow standard.

HAR §13-169-36 Modifying instream flow standards. The modification of an existing instream flow standard by the commission may be initiated by the commission or by a petition to the commission by any interested person. The petition for modifying instream flow standards shall be made on forms provided by the department. The procedure for modifying an existing instream flow standard shall be similar to that for the establishment of an instream flow standard; provided that insubstantial modification may be determined and authorized without notice or hearing by the commission and provided, further, that the commission shall hold a hearing upon the written request of any person adversely affected by such order. (emphasis added).

HAR §13-169-45 Interim instream flow standard for Kauai. The Interim Instream Flow Standard for all streams on Kauai, as adopted by the commission on water resource management on June 15, 1988, shall be that amount of water flowing in each stream on the effective date of this standard, and as that flow may naturally vary throughout the year and from year to year without further amounts of water being diverted offstream through new or expanded diversions, and under the stream conditions existing on the effective date of the standard. (Eff. Oct. 8, 1988).

HAR §13-169-50 Permit required. (a) Stream channels shall be protected from alteration whenever practicable to provide for fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses. No stream channel shall be altered until an application for a permit to undertake the work has been filed and a permit is issued by the commission; provided that routine streambed and drainageway maintenance activities and maintenance of existing facilities are exempt from obtaining a permit.

STAFF REVIEW

HAR §13-168-32(d) set out the general criteria for ruling on SDWP applications:

1. The quantity and quality of the stream water or the stream ecology shall not be adversely affected.

Staff: Between 1914 – 1933 the average annual flow of the Lumaha'i River was 75 mgd. The diverted amount (0.54 mgd) is less than 1% of the average annual flow and is within the Rivers' natural variability. The baseflow (the amount of water entering the stream from groundwater) is estimated to be about 29 mgd at Q70. Q70 is a general guideline for the minimal amount of streamflow needed for fish habitat. The diverted

amount (0.54 mgd) will not reduce the flow below the Q70 (29 mgd). Therefore, the quantity or quality of stream water or stream ecology is not adversely affected.

2. Where instream flow standards or interim instream flow standards have been established pursuant to chapter 13-169, no permit should be granted for any diversion works which diminishes the quantity or quality of stream water below the minimum established to support identified instream uses, as expressed in the standards.

Staff: The Interim Instream Flow Standard (IIFS) for all streams on Kauai was adopted on June 15, 1988 and is the amount of water flowing in each stream and as that flow that may naturally vary throughout the year. (HAR §13-169-45).

The modification of an existing instream flow standard may be initiated by the Commission. An insubstantial modification may be determined and authorized by the Commission. (HAR §13-169-36).

The average annual flow is 75 mgd. The Q70 is 29 mgd. The diverted amount of 0.54 mgd is less than 1% of the average annual flow and well above the Q70. Staff recommends that the requested amount is an insubstantial modification of the IIFS. Therefore, a Petition to Amend Instream Flow Standard (PAIFS) is not required by the Landowner/Applicant. A previous Declaratory Ruling, DEC-ADM12-14, dated November 21, 2012 allowed a de minimis amount of water to be withdrawn from the Manoa Stream for data collection, research and scientific purposes without filing a PAIFS.

3. The proposed diversion works shall not interfere substantially and materially with existing instream or non-instream uses or with diversion works previously permitted.

Staff: Instream uses, such as ecosystem maintenance or recreation, are unchanged. There are no existing non-instream uses or diversion works downstream of the site.

ADMINISTRATIVE AND CIVIL PENALTY GUIDELINE (G14-01)

On October 1, 2014, the Commission approved its Administrative and Civil Penalty Guideline (G14-01) to provide a logical and consistent means to assess penalties and guide the settlement of Commission enforcement cases. The goals are to provide a logical and consistent means to assess penalties and guide the settlement of Commission enforcement actions by:

- a) Deterring violations;
- b) Removing the economic benefit of violations;
- c) Provide fair treatment of the regulated community; and
- d) Offer the violator a chance to undertake a beneficial alternative, under proper conditions, in a partial or total replacement of a cash penalty.

1. Alleged Violation: Stream Diversion Works Construction Without a Permit

Initial Staff Administrative Fee

On September 9, 2015, the Applicant was issued a written notice of alleged violation. Per Administrative and Civil Penalty Guideline (G14-01), an administrative fee of \$500 shall be assessed when there is a written notice of alleged violation.

Penalty Calculation Method

A. Initial Minimum Penalty.

1. Finding of Violation. \$250 day/incident
Staff: No SDWP on file.
2. Occurring in a Water Management Area. \$0 day/incident
Staff: Lumaha'i River not in a Water Management Area.
3. Repeat Violation. \$250 day/incident
Staff: A repeat violation is deemed to occur when the party has previously been found to be a violator by the Commission. A repeat violation is tied to the party involved and is irrespective of the nature of the violation. See Complaint and Dispute Resolution CDR.3010.8 Lālākea Stream, Hawaii Island below.

CDR.3010.8 Lālākea Stream, Hawaii Island (1998).

In 1989, the Hāmākua Sugar Company (Hāmākua Sugar) diverted water from Lālākea Stream to make repairs on the Lower Hāmākua Ditch tunnel without a stream diversion works permit. Hāmākua Sugar never restored the stream because they said the flow would damage the ditch and adversely affect sugarcane.

In 1993, Hāmākua Sugar went bankrupt without removing the diversion.

In 1994, KS became the successor in interest to Hāmākua Sugar lands.

In 1995 and 1998, waste complaints were filed with the Commission regarding the unpermitted diversion of water into a dry gulch.

In 1998, the Commission ordered KS to remove the diversion by 1999.

In 2000, the Commission approved a series of conditions regarding the diversion. The conditions were not met and KS did not submit the application for diversion abandonment by the deadline and was fined \$453,000. Later, the Commission agreed to an alternative penalty settlement that required KS to conduct stream ecology studies and other actions.

B. Adjustments to Initial Minimum Penalty: Mitigative and Gravity Factors.

Reduction or enhancement of any recommended fine will be made based on: (1) the degree of risk or actual harm to water resources or the environment and (2) specific factors listed below. Where the risk or actual harm is slight, reduction of the recommended fine should be considered and where the risk or actual harm is great, enhancement of the recommended fine should be imposed.

1. Mitigation Component.

Mitigative factors can be considered in the recommendation of any fine or alternative penalty. The presence of one or more mitigative factors can reduce or eliminate the fine or alternative penalty recommendation. Mitigative factors include but are not limited to:

- a. Insignificant impact on the resource. \$(100)
Staff: No significant impact on the resource.
- b. Attempt to remedy the violation. \$0
Staff: Not applicable.
- c. Good faith effort to remedy violation once noticed. \$(100)
Staff: SDWP application filed when notified that a permit was needed.
- d. Self reporting in a timely manner. \$0
Staff: Not applicable.
- e. Diligent and speedy effort to remedy the violation once noticed. \$(100)
Staff: SDWP application filed when notified that a permit was needed

2. Gravity Component.

Gravity factors can be considered in the recommendation of any fine or alternative penalty. The presence of one or more gravity factors can enhance the fine or alternative penalty recommendation. Gravity factors include but are not limited to:

- a. Significant risk of or actual damage or harm to the water resources or the environment. \$0
Staff: No harm or damage was done to the resource.
- b. Multiple or repeat violations of the code or regulations. \$100
Staff: See CDR.3010.8 Lālākea Stream, Hawaii Island.
- c. Evidence that the violator should have known about the violation. \$100
Staff: Landowner should have been aware of the need for a SDWP.

- d. Refusal to correct the violation once noticed. \$0
Staff: Applied for a SDWP when notified that a permit was needed.
 - e. Failure to meet deadlines as set by the Commission or its staff. \$0
Staff: SDWP filed in a timely manner.
- C. Calculation of the Number of Days for the Recommended Fine.
- 1. If one or more of the gravity components are met, a daily fine may be imposed. Those fines shall accrue on the following basis:
 - a. Violation where no permit is issued and no prior permits have been issued or no permit is required.
Staff: Not applicable. A water use report or similar no permit action is not applicable in this situation.
 - b. Violation where no permit is issued but prior permits have been issued.
Staff: The previous violation (1998) involving the Lālākea Stream diversion was resolved and the falls restored. The Harada Farm got a lease from KS in the late 1990's. Presumably, the diversion went in at that time without a permit.
 - c. Violation where permit has been issued. Either:
 - a. The date the violation has occurred.
 - b. The date of permit approval.
 - c. The date permit issued.
 - d. The date of Commission meeting for conditions or deadlines imposed by the Commission not contained in a permit.
Staff: Not applicable.
 - d. Tolling. In calculating a recommendation for the imposition of a daily fine, the time may be tolled upon the filing of a permit application, satisfactory progress in addressing the violation, or for good cause.
Staff: No daily fine as permit application was filed in a timely manner.
 - e. End. In calculating a recommendation for the imposition of a daily fine, the period of the violation ends upon: (1) satisfactory resolution of the violation, or (2) removal or remedy of the violation.
Staff: No daily fine as permit application was filed in a timely manner.
- D. No staff recommendation shall exceed the maximum amount allowable in Section 174C-15, HRS.

Summary of Total Recommended Fines – Stream Diversion Works Without A Permit

Administrative Fee:	\$500
Initial Minimum Penalty:	\$500
Mitigative Component:	\$(300)
Gravity Component:	\$200
<u>Duration:</u>	<u>1 day</u>
TOTAL:	\$900

ALTERNATIVE SETTLEMENT

The following considerations will guide the Commission's staff recommendation in deciding whether to allow a project to substitute for or be credited against a cash penalty. However, any finding of a violation by the Commission shall result in a minimum one time \$500 cash fine in addition to an alternative settlement. Failure to successfully meet the alternative will result in re-institution of the fines as calculated in the penalty calculation method above.

1. The project must be something that the violator was not required to do anyway, either because of legal or other obligation. Projects committed to, or started before a settlement is finally agreed upon may be eligible for credit, but such projects must be carefully examined to determine the extent to which they resulted from the enforcement case or were due to other factors, or prior plans or commitments. In some cases, partial credit may be appropriate.
2. The project must result in new water resources (including aquatic biota) information, provide water resources education, or benefit the water resources of the state.
3. The project may consist of corrective-action to be completed within a timeframe established by the Commission. Failure to abide by the timeframe will result in re-institution of the fines as calculated in the penalty calculation method above.

FUTURE APPLICATIONS

Future applications from an applicant who has not paid fines or met alternative settlements or for a project with outstanding violations may be considered incomplete until sanctions are fulfilled and/or violations are corrected.

RECOMMENDATION

That the Commission:

1. Find that the Landowner, Kamehameha Schools violated Section 174C-93, Hawaii Revised Statutes (HRS) and §13-168-32, Hawaii Administrative Rules (HAR) by installing a stream diversion works without a permit;

2. Issue administrative and civil penalties of \$900 against Landowner Kamehameha Schools pursuant to HRS §174C-15, HAR §13-168-3, and Administrative and Civil Penalty Guideline (G14-01);
3. Issue a written warning to the Landowner indicating any future violations involving a stream diversion without the necessary permits may be considered repeat violations with fines up to \$1,000 for each day of violation;
4. Approve a Stream Diversion Works Permit (SDWP.3936.2) Application after-the-fact for a battery of eight intakes diverting about 0.54 mgd of water to irrigate five acres of taro and five acres of banana, ti, and luau leaf subject to the standard permit conditions in Exhibit 5;
5. That the diverted amount requested, 0.54 mgd, being less than 1% of the average annual flow is within the normal variability of streamflow and considered an insubstantial modification. Therefore, a Petition to Amend Instream Flow Standard is not required by the Landowner/Applicant under HRS §174C-71 and HAR §13-169-36;
6. Update the standard stream channel and diversion works permit conditions to state that the project may require other agency approvals regarding wetlands, water quality, grading, stockpiling, endangered species, and floodways; and,
7. The Applicant should contact the Department of Health, Soil and Water Conservation District, Army Corps of Engineers, Fish and Wildlife Service regarding their concerns and permit requirements, if any.

Respectfully submitted,



JEFFREY T. PEARSON, P.E.
Deputy Director

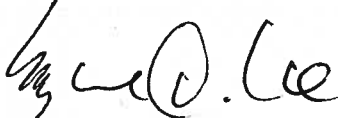
Exhibits:

1. Location: West bank of the Lumaha'i River, Kaua'i, TMK: (4) 5-7-003:001.
2. Lumaha'i Stream and Watershed, Kaua'i.
3. Flex Hose Tethered to a Buoy to the Pump.
4. Stream Diversion Schematic.
5. Standard Stream Diversion Works Permit Conditions.

Attachment:

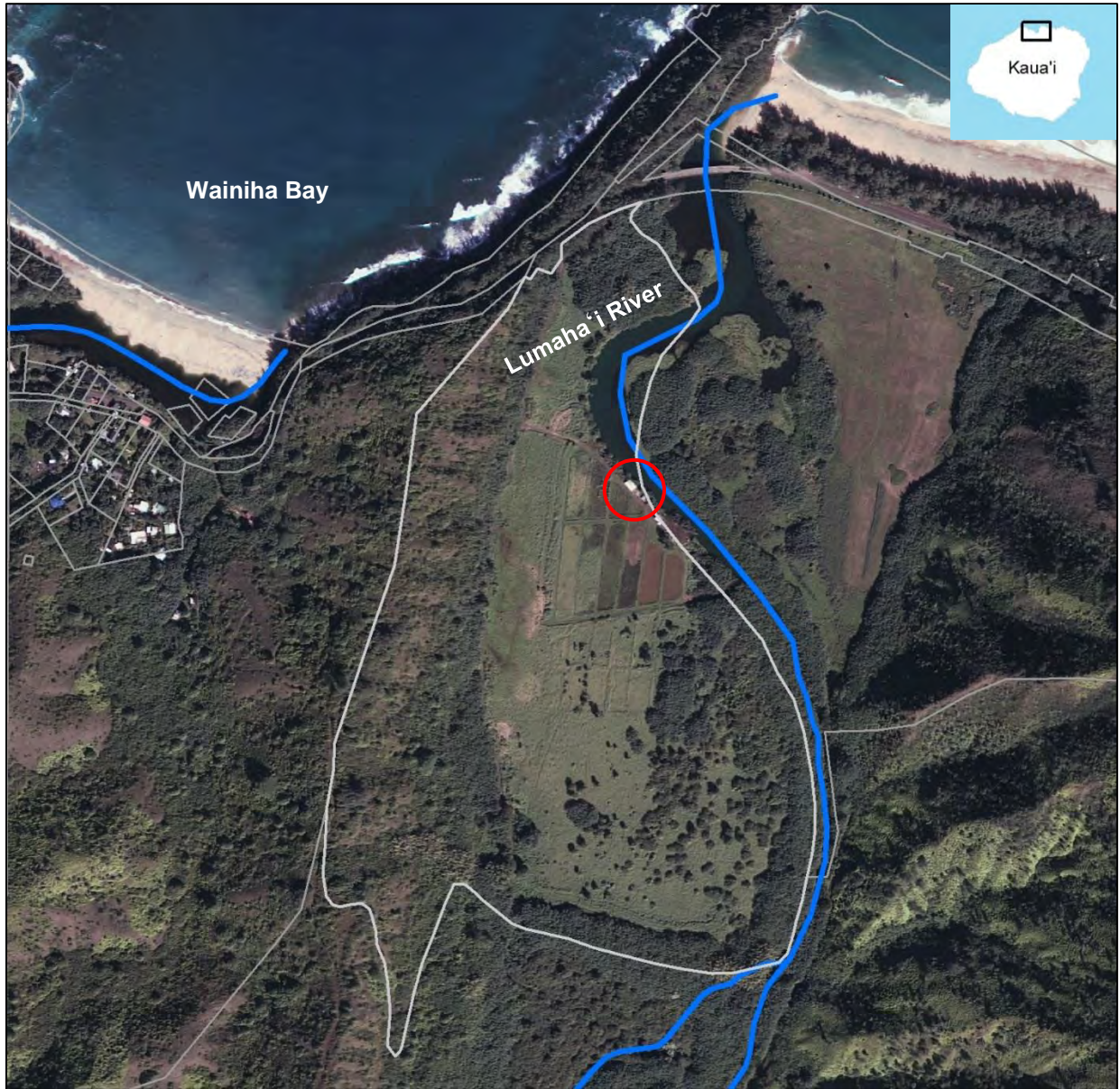
Letter of support from Kamehameha Schools

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE
Chairperson

Location: West bank of the Lumaha'i River, Kaua'i, TMK: (4) 5-7-003:001.



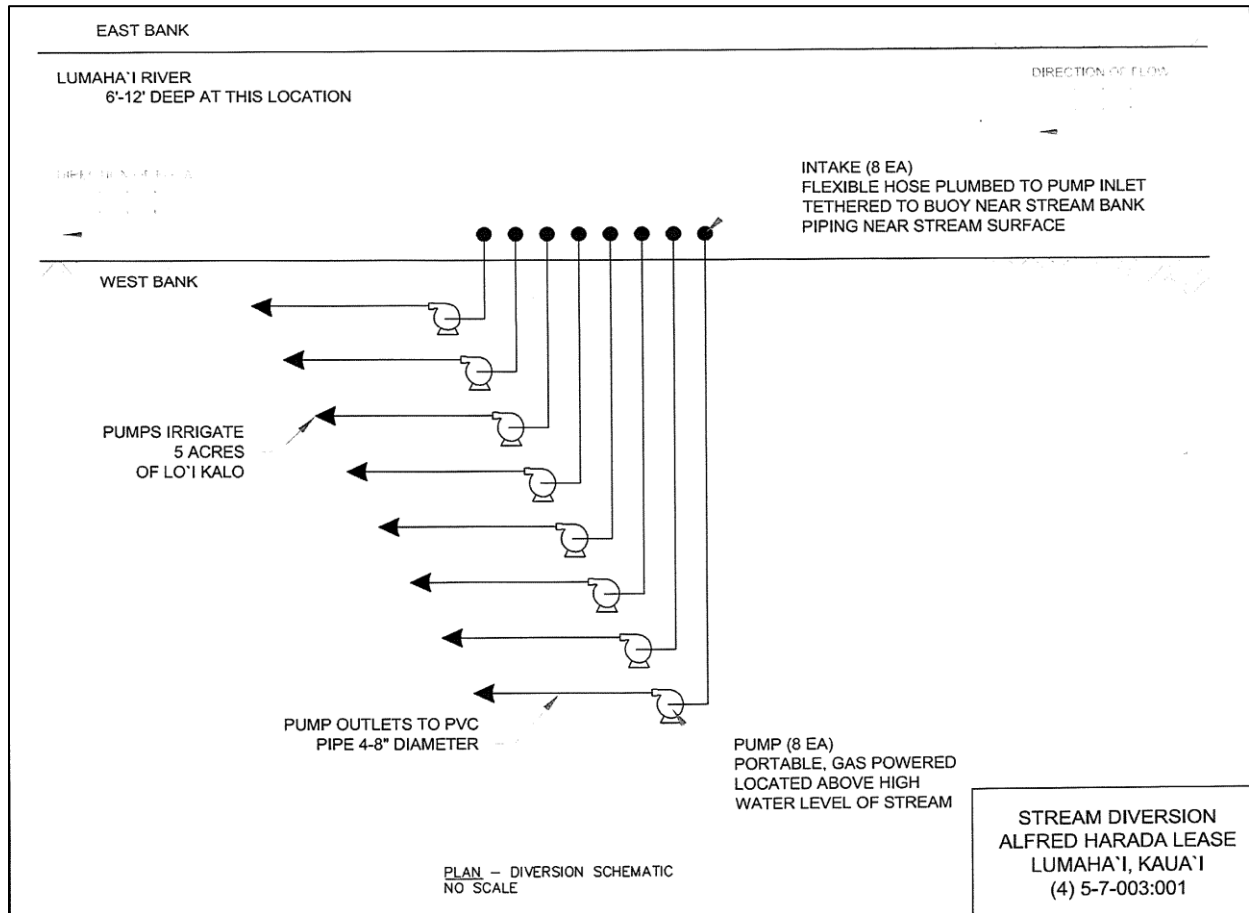
Lumaha'i Stream and Watershed, Kaua'i.



Flex Hose Tethered to a Buoy to the Pump.



Stream Diversion Schematic.



STANDARD STREAM CHANNEL ALTERATION PERMIT AND
STREAM DIVERSION WORKS PERMIT CONDITIONS
(Revised January 28, 2016)

1. The permit application and staff submittal approved by the Commission at its meeting on {Date}, shall be incorporated herein by reference.
2. The project may require other agency approvals regarding wetlands, water quality, grading, stockpiling, endangered species, and floodways. The permittee shall comply with all other applicable statutes, ordinances, and regulations of the Federal, State and county governments.
3. The permittee, his successors, assigns, officers, employees, contractors, agents, and representatives, shall indemnify, defend, and hold the State of Hawaii harmless from and against any claim or demand for loss, liability, or damage including claims for property damage, personal injury, or death arising out of any act or omission of the applicant or his successors, assigns, officers, employees, contractors, and agents under this permit or related to the granting of this permit.
4. The permittee shall notify the Commission, by letter, of the actual dates of project initiation and completion. The applicant shall submit a set of as-built plans and photos in electronic format of the completed work to the Commission upon completion of this project. This permit may be revoked if work is not started within six (6) months after the date of approval or if work is suspended or abandoned for six (6) months, unless otherwise specified. The proposed work under this permit shall be completed within two (2) years from the date of permit approval, unless otherwise specified. The permit may be extended by the Commission upon showing of good cause and good-faith performance. A request to extend the permit shall be submitted to the Commission no later than three (3) months prior to the date the permit expires. If the commencement or completion date is not met, the Commission may revoke the permit after giving the permittee notice of the proposed action and an opportunity to be heard.
5. Before proceeding with any work authorized by the Commission, the permittee shall submit one set of construction plans and specifications in electronic format to determine consistency with the conditions of the permit and the declarations set forth in the permit application.
6. The permittee shall implement site-specific, construction Best Management Practices (BMPs) in consultation with the Department of Health's Clean Water Branch and other agencies as applicable, that are designed, implemented, operated, and maintained by the permittee and its contractor to properly isolate and confine construction activities and to contain and prevent any potential pollutant(s) discharges from adversely impacting State waters per HRS Ch. 342D Water Pollution; HAR §11-54-1 through §11-54-8 Water Quality Standards; and HAR Ch. 11-55 Water Pollution Control, Appendix C. BMPs shall control erosion and dust during construction and schedule construction activities during periods of low stream flow.
7. The permittee shall protect and preserve the natural character of the stream bank and stream bed to the greatest extent possible. The applicant shall plant or cover lands denuded of vegetation as quickly as possible to prevent erosion and use native plant species common to riparian environments to improve the habitat quality of the stream environment.
8. In the event that subsurface cultural remains such as artifacts, burials or deposits of shells or charcoal are encountered during excavation work, the applicant shall stop work in the area of the find and contact the Department's Historic Preservation Division immediately. Work may commence only after written concurrence by the State Historic Preservation Division.



2015 11 04 08:11

KAMEHAMEHA SCHOOLS®

VIA REGULAR MAIL and e-mail to Rebecca.R.Alakai@hawaii.gov

November 4, 2015

Commission on Water Resource Management
Department of Land and Natural Resources, State of Hawai'i
P.O. Box 621
Honolulu, Hawai'i 96809
Attn: Ms. Suzanne Case, Chairwoman

RE: Application for After-the-Fact Stream Diversion Works Permit (SDWP.3936.2)
Lumaha'i River, Hanalei District, Kaua'i, TMK (4) 5-7-003:001

Dear Madam Chairwoman:

This letter is given in support of the Application for After-the-Fact Stream Diversion Works Permit (SDWP.3936.2) (the "Application") filed by Mr. Alfred "Yoshi" H. K. Harada and Ms. Sierra-Lynn Boro-Harada (the "Haradas") on March 10, 2014.

The Haradas, who are of Native Hawaiian ancestry and have a long history of farming taro in the area, have farmed the land in Lumahai since the mid-1990s. Since September 2005, the Trustees of the Estate of Bernice Pauahi Bishop ("KS") have licensed approximately 80 acres of land along the Lumaha'i River (the "River") in Kaua'i (i.e., TMKs (4) 5-7-003:001 and 010) to the property subject to the Application, TMK (4) 5-7-003:001 (the "Property"), totals approximately 49 acres of which the Haradas have approximately five acres in active cultivation almost entirely devoted to lo'i kalo (wetland taro). Pictures of the Property are enclosed and marked as Enclosure A-1.

In 2013, the Land Use Commission (LUC) approved KS' petition to designate a portion of the Property (and other lands on Kaua'i) as important agricultural lands (IAL). In that process, the Harada's diversion from the River (the "diversion") was discovered. Then, as now, KS is committed to work with the Haradas and the State to obtain the appropriate permits for the diversion.

The Haradas divert water from the River through a series of gas-powered pumps that are the sole source of the diversion. Pictures of the pump system are enclosed and marked as Enclosure B-1. Because the land sits at a higher elevation than the River, the pumps are required to draw the River water up to a system of PVC pipes that irrigate the lo'i. As stated in the Application, the Haradas divert an estimated 0.543 million gallons of water from the River per day (mgd). Based upon historic flow data from the U.S. Geologic Survey, the Harada's diversion equates to

567 SOUTH KING STREET, HONOLULU, HAWAII 96813 TELEPHONE (808)534-8189 FAX (808) 523-6374

Founded and Endowed by the Legacy of Princess Bernice Pauahi Bishop

ATTACHMENT

SDWP. 3936.2
13497

Commission on Water Resource Management
RE: Application for After-the-Fact SDWP.3936.2
November 4, 2015
Page 2 of 2

approximately 0.7% of the River's average annual flow of 77.5 mgd. The diversion is also non-intrusive such that its location and footprint on the River bank is virtually irrelevant relative to the size and volume of the River, and by consequence, poses little if any detrimental impact to the ecosystem.

The Haradas are long-time residents of Hanalei, respected members of Kauai's agricultural community, and are good stewards of the land who perpetuate traditional Native Hawaiian agricultural practices. Their lo'i kalo cannot survive without the water supplied by this diversion. We hope you will approve their Application.

Sincerely,



Joey Char
Land Asset Manager
Kamehameha Schools
Community Engagement & Resources Group

Enclosures

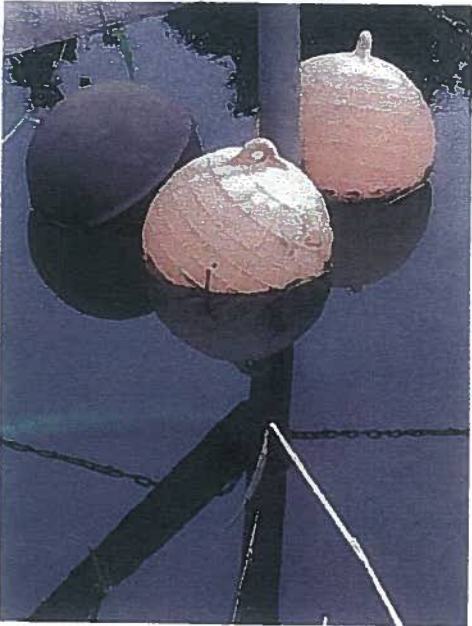
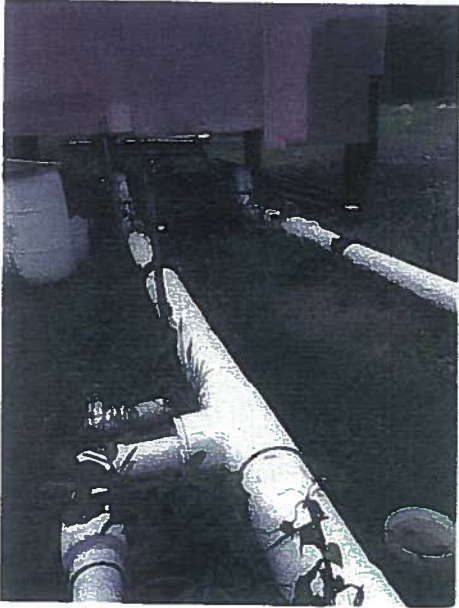
ENCLOSURE A-1 – Photos of the Haradas Lo`i Kalo



ENCLOSURE A-1 – Photos of the Haradas Lo`i Kalo



ENCLOSURE B-1 – Photos of the Haradas Pump Irrigation System



ENCLOSURE B-1 – Photos of the Haradas Pump Irrigation System

